In the Supreme Court of the United States

OCTOBER TERM, 1922.

KEOKUK & HAMILTON BRIDGE COMPANY, a corporation, appellant, *v.* THE UNITED STATES. } No. 58.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

The findings of fact show that the appellant, Keokuk & Hamilton Bridge Company, had built a bridge across the Mississippi River and, in connection with such bridge, maintained a protection pier which extended from the bridge down stream. In September, 1913, this protection pier was in a damaged condition and the timbers had suffered some decay. (Finding II.) Prior to that date, the Mississippi River Power Company, a private corporation, was building a power dam across the river for the generation of electric power, and, as it was thus using a navigable stream, this power plant was being con-

structed subject to the approval of the United States Government, in order that it should not interfere with navigation. In constructing this dam, and "for the purposes of improving navigation," the United States undertook, in 1913, to deepen the channel of the Mississippi River. (Finding V.) It thus became necessary to excavate some solid rock at the bottom of the river, and this was done by the use of explosives. "The work was done in the usual and ordinary way, and with more than ordinary care." (Finding VI.) In thus deepening the channel for the purposes of navigation, the blasting of the river-bed rock, either by concussion or by the action of the waves thrown up in blasting, caused further damage to the protection pier in question. (Finding VII.) It subsequently became necessary to rebuild the appellant's bridge for "heavier traffic," and this necessitated the reconstruction of the protection pier. But for this reconstruction of appellant's bridge to meet the demands of "heavier traffic," the damage to the old pier "could have been repaired at an expense of one thousand dollars"; but the new protection pier cost $13,680.17. (Finding VII.)

Under these facts the question arises whether the Government is liable, in deepening the channel of a navigable stream, for the incidental damage of such work to an old pier which in any event had to be abandoned and supplanted with new construction, not because of the Government's work, but because

the appellant, to meet the demands of "heavier traffic," was obliged to rebuild its bridge.

ARGUMENT.

When the United States Government permitted the appellant to build a bridge across the Mississippi River the appellant accepted its franchise on the implied condition that the bridge was at all times subject to the paramount authority of the Federal Government to do whatever was necessary to protect and maintain the navigability of the Mississippi River. If, for example, the height of the bridge's span, with the growth of commerce, had become insufficient to permit the passage of vessels, it can not be denied that the Government, to maintain the navigability of the river, could order the appellant to reconstruct the bridge so that vessels of greater height could pass under it.

This reservation of power does not rest upon implication; for the appellant's bridge was built under the provisions of the act of July 25, 1866 (14 Stat. 244), which was a general act authorizing the construction of bridges across the Mississippi River at different points and prescribing the conditions upon which such permission should be granted. The last section provided (p. 246):

> SEC. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

That the Government is not liable for damages necessarily incurred in the work of maintaining or improving the navigability of a river is shown by a long line of decisions of this court, of which the most recent is the case of *John Horstmann Company* v. *United States*, decided November 21, 1921. In that case, the United States constructed an irrigating system, and, in impounding the waters of the Truckee River, it caused, by seepage, a rise in the waters of two soda lakes and the submergence of a plant which the appellant in that case, the John Horstmann Company, had built upon the border of one of the lakes for the extraction of soda. The case was a hard one, as the rise in the lake level, due to the construction of the Government irrigating system, eventually submerged the appellant's plant and permanently destroyed its value. Nevertheless, this court held that there was no "taking" of the appellant's plant, and therefore no implied contract to pay for the damage caused, because the work was done by the Government in the exercise of its right to build an irrigation system, and the consequences were only incidental.

The ground for this decision is that, as there can be no recovery against the Government for damages in cases arising out of tort, such immunity can not be destroyed by an implied "taking" of the property, which, in point of fact, has not been taken, but has only suffered some incidental and temporary damage, due to the work of necessary construction. Such a suit can only be based upon the theory of an

implied contract and such a contract can not be implied except where there is a conscious, deliberate, and unmistakable appropriation by the Government of private property. It is true that such a contract can be proven by acts, as well as words; but the acts must be such as indicate a conscious and deliberate appropriation of a property, and no contract can arise where the taking is merely a fiction of the law. This is especially true where the damage complained of is incident to the construction of a public work and where the thing damaged is itself subject to the paramount power of the Government to enter upon such public work.

This is well illustrated by the case of *Bedford* v. *United States* (192 U. S. 217). In that case the Government had constructed certain revetments along the banks of the Mississippi, in order to prevent the erosion of the banks by the waters, near the city of Vicksburg. The construction of these revetments caused a change in the course of the river, which in turn resulted in the overflow of the lands of a riparian owner, who thereupon sued and invoked the doctrine of the *Lynah case* (188 U. S. 445). This court, however, held that there was no taking, and that the plaintiff was without a remedy. It held that the Government could not be prevented or embarrassed in safeguarding the interests of the other riparian owners simply because its work might cause such change in the river as to injure the plaintiff. In all such cases the Government, under its power over the

immediate, and necessary effect was to cause a permanent overflow of the plaintiff's land. It was held by an almost equally divided court that this direct effect justified the implication that the Government intended the necessary consequences of its acts, and that this constituted a "taking," within the Fifth Amendment of the Constitution. It is obvious that the later cases which I have cited go far to modify the doctrine of the *Lynah case* and to restrict it to its own peculiar facts. In any event, it is distinguishable from the case at bar; for there is nothing in the findings of fact to show that, when the Government undertook to deepen the channel, it recognized that a certain result of the work would be some damage to the protection pier of appellant's bridge, which was already in a bad state of repair. For all that appears, the effect of the blasting was wholly unanticipated by the Government engineers. Moreover, in the *Lynah case*, the overflow of the plaintiff's land was permanent and thus—as a fact, and not as a mere fiction—the Government had taken his property in widening the river at that point.

In the case at bar there was no permanent submergence of the protection pier. The pier was merely damaged, partly by its already weakened condition due to decay, and partly by the action or the force of the waves. It would stretch the doctrine of implied taking very far to hold that such an unintentional and unanticipated damage was a taking of the protection pier which thereafter continued to remain in the possession of the

bridge company. Surely, if Government vessels had passed up the stream and the wash of their waves had done some incidental damage to the protection pier, it could hardly be contended that such damage was a "taking" of the protection pier by the Government.

In determining whether an implied contract rose to pay for damage necessarily incident to the construction of a public work, it should again be emphasized that the appellant company had no rights in the river, except by sufferance of Congress, and that it in part owed its franchise to the United States, which, by act of Congress of July 25, 1866, permitted the construction of the bridge (14 Stat. 245). Subsequently, the Government found it necessary, in the common interest, to deepen the channel. As a necessary incident to such work, the Government inflicted a slight injury upon a protection pier which only existed in the channel of the stream by its permission. Under these circumstances, an implication of an intention to pay for a purely fictitious taking finds no support in any reported case which I have found.

A contrary implication of an intention not to pay is supported by the leading case of *Bridge Co.* v. *United States* (105 U. S. 470), where Congress authorized the construction of a bridge across the Ohio River of a certain character, and, while it was in process of construction under its franchise, Congress, by subsequent statute, declared that it should be unlawful to proceed with the construction unless

certain specified changes were made. This court held that no contract could be implied to pay for such changes and that Congress could withdraw its assent to a bridge of a particular construction whenever it was necessary, in its judgment to do so, to protect the navigation of the river. This court said, at page 480:

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

Apart from the foregoing considerations, the record presents a case of *damnum absque injuria;* for the findings of fact do not show that the appellant company was at any expense in rebuilding the old protection pier. They do say "that the pier was thus so damaged as to necessitate considerable repair or rebuilding"; but, for all that appears, before either repairs were made or rebuilding commenced, it became necessary, not on account of the Government's act, but because of the demands of commerce, to rebuild the bridge entirely for heavier traffic, and, in connection with such rebuilding of the bridge, an entirely new protection pier was constructed. For all that appears, even if the old protection pier had been repaired, it would have been necessary to sup-

plant it with an entirely new one for the new bridge. Thus the expense of building a new protection pier, which was the only expense incurred by the appellant, was necessitated by its own requirements and not by the act of the Government, and would have been neither more nor less if the Government had never damaged the old pier.

The case thus presents a fictitious taking with a fictitious damage, and such double fiction fully justified the Court of Claims in rejecting the appellant's claim.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

SEPTEMBER, 1922.

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MEMORANDUM OF ADDITIONAL AUTHORITIES.

The rule is well settled that to entitle an owner to the protection of the fifth amendment there must be a physical and permanent appropriation of the property or its necessary uses which would be equivalent to a practical ouster from possession. There is a clear distinction between temporary damage to a property through some governmental activity and such permanent taking. Thus in the case of *Transportation Company* v. *United States*, 99 U. S. 642, it was said:

> Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.

Many governmental operations incidentally and temporarily work injury to private property. During the Great War the big guns at Sandy Hook were repeatedly fired off, causing temporary inconvenience and even incidental damage to houses for miles around, but it was incident to the war operations in the national defense, and the property owners in the vicinity of Sandy Hook never dreamed that their property had been taken by this temporary use by the Government of one of its forts.

The same rule applies even to private operations, for it was well said by Chief Judge Bronson in *Radcliff* v. *Brooklyn*, 4 N. Y. 195:

> A fort, jail, workshop, fever hospital, or lunatic asylum erected by the Government may have the effect of reducing the value of a dwelling house in the immediate neighborhood, and yet no provision for compensating the owner of the house has ever been made in such case.

The doctrine is well stated in the later case of *Bedford* v. *United States*, 192 U. S. 224:

> The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision.

The court then cited appropriately the case of *Gibson* v. *United States* (166 U. S. 269). In that case the claimant owned a farm on an island in the Ohio River valuable as a market garden. She had wharves upon the river and used them for the purpose of transporting the produce of her farm to the market. Congress authorized the improvement of the Ohio River by the construction of a dike which diverted the water entirely from the claimant's frontage, destroyed the only landing on the farm, and made it impossible for her to ship her produce by water. The court said:

> The fifth amendment to the Constitution of the United States provides that private

> property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

In that case the claimant had acquired her farm before the dike was projected.

In *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners* 200 U. S. 561, the court, distinguishing the cases of damage from those of real taking, said:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use and a right to compensation, on account of such injury, does not attach under the Constitution.

In the few cases where a permanent flooding has been regarded as a taking, such as *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445, there was, as the court showed in the case of *Transportation Company* v. *United States*, 99 U. S. 642, "a practical ouster of his (claimant's) possession" and the court indicated that such practical ouster, obviously meaning a permanent ouster, was to be distinguished from the other class of cases "where all that was done was to render for a time its use more inconvenient."

This principle has been frequently applied in blasting cases. Thus in *Booth* v. *Railroad*, 140 N. Y. 262, the defendant in order to depress its roadbed below the surface of the street was obliged to blast the rock and as a result the plaintiff's house on an adjacent lot was injured. The court said:

> The test of the permissible use of one's own land is not whether the use or act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of the property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?

The same rule was made in *Benner* v. *Atlantic Dredging Co.*, 134 N. Y. 156, where the blasting of rock in order to clear the East River from the Hell Gate obstruction to navigation injured plaintiff's house by concussion. The court held that the effect of concussion was not a physical invasion of plaintiff's premises as there would have been if the débris of the blasting rock had fallen upon plaintiff's premises, and the court concluded:

> One can not confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits can not be unlawful, and the consequential injury, if any, must be remediless.

The moral justification for the rule is well stated by the Supreme Court of New Jersey in *Stevens* v. *Paterson Railroad Co.*, 34 N. J. L. 532, where the court said:

> Every citizen is required at times to contribute something, by way of sacrifice, to the public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation.

One further distinction can be drawn between cases of damage and cases of true taking: in the latter cases if the Government is called upon to compensate for a taking it is then entitled to the property. This was recognized in the case of *United States* v. *Lynah*, 199 U. S. 445, where it was said:

> The proceedings must be regarded as an actual appropriation of the land, including the possession and the fee, and, when the amount awarded as compensation is paid, the title, the fee, and whatever rights may attach thereto pass to the Government, which becomes henceforth the owner.

Of course such a test can not be applied to the case at bar. It is not pretended that if the United States had, as contended, taken the plaintiff's protection

pier that the plaintiff thereafter in any manner released its ownership of the pier. Its claim is not for property taken but for property damaged. It can not claim for damages because the Government can not be sued in tort, and it can not claim for a taking because after the blasting the protection pier even though in a damaged state was as much the property of the claimant as before.

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